case. Rather, we are challenging a policy which has been on the books since 1965 and which is based on a concept that began under administrative case law as far back as 1947, which, except in the rare case where an experienced broadcaster with financial resources is awarded the construction permit, flies in the face of rationality and normal human and business experience. We are challenging a policy as to which in this record there is no evidence of a single integration success story -- a success story in which the integration proposal of a winning party was in fact put into effect for a long-range period of time as testified to in the hearing room.

For the umpteenth time, in our opening brief, we challenged the FCC to provide evidence of such a success story. None has been provided. The FCC brief, at 23, n. 9, lists a total of six comments filed in response to the April 1992 rulemaking proceeding, mirroring the assumptions which the FCC has made about the benefits of integrating ownership and management, but there is no reference by any commenting party to any integration success story even though the commenting parties include minority groups having a special interest in knowing about any minority integration success stories that might have taken place.[5]

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[5] The FCC refers to comments by one of the parties regarding a practice of the McDonalds restaurant chain to require or encourage local ownership and participation in management by its franchisees. This should not be news to the Commission, which has been exposed to McDonalds franchise requirements in comparative hearing cases for a number of years. E.g., Washoe Shoshone Broadcasting, 3 FCC Rcd. 3948, 3952-53 (Rev.Bd. 1988); Coastal Broadcasting Partners, 4 FCC Rcd. 7512, 7513 (Rev.Bd. 1989); Metroplex Communications, Inc., 4 FCC Rcd. 8149, 8160 (Rev.Bd.1989), reversed, 5 FCC Rcd. 6610, 5613 n.7 (1990). But

Commenting parties who oppose the integration factor include real world broadcasters such as ABC, CBS, NBC and the National Association of Broadcasters, JA 352-423, attesting to the efficacy of the use of trained, professional station managers under responsible ownership supervision.

FCC policy judgment to defend the integration factor at this late stage is not supported by cases cited. The FCC brief, at 26-28, says, but we are not required to make studies in support of our policy, we can make predictive judgments based upon our expertise, Mrs. Bechtel is trying to write FCC policy for us, etc. etc. The FCC's case citations do not support the FCC's position that it is not required to satisfy itself that its policies actually work. (a) FCC v. WNCN Listeners Guild, 450 U.S. 582 (1980) upheld an FCC policy to leave the selection of entertainment formats to the marketplace and not to governmental regulation. The challenge to that policy was brought immediately following the adoption of the policy, not 25-50 years after the policy had been in place. The Supreme Court upheld the theretofore untested policy in question but, in words of direct application here, cautioned that:

> Of course, the Commission should be alert to the consequences of its policies and should stand ready to alter

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the McDonalds example is hardly apposite here. In the case of McDonalds, a commercial franchisor instructs local owner-managers regarding the last details of menus, napkins and lavatories based upon some 40 years of a highly successful business operation. Here, the FCC selects a local owner-manager who usually has no previous broadcast experience and is insulated so that he or she cannot even talk to his or her financial and business partners, under a bureaucratically-conceived scenario which on the record here has never been proved to have worked in practice.

> its rule if necessary to serve the public interest more fully. As we stated in National Broadcasting Co. v. United States: "If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." 319 U.S., at 225.

450 U.S. at 603. (b) FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1977) upheld an FCC policy to preclude future joint ownership of daily newspapers and television stations in the same market, grandfathering existing joint ownership situations except in 16 markets where the joint ownership was both of the only local daily newspaper and the only television station. Again, this decision was directed to the initial adoption of the policy, not the failure of the FCC decades later to critically examine the obvious invalidity of the policy based on years of actual experience. Moreover, the NCCB decision was based upon studies relied on by the FCC, first studies that showed that newspapers and televisions dominated the news available to the public, then studies of individual markets throughout the nation, not only to arrive at the 16 markets which were not grandfathered, but also to grant special treatment to certain other markets as well. 436 U.S. at 783-84, 788. (c) Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), upheld comparative hearing and distress sale preferences for minorities in reliance on studies showing, and enactments of Congress premised upon, an asserted empirical nexus between minority ownership and broadcast diversity. 495 U.S. at 569-590. (d) FCC v. Schreiber, 381 U.S. 279 (1964) upheld an FCC rule restricting

seal, rather than on the public record, as a valid exercise under the statute granting the Commission plenary power to conduct its proceedings and agency business. Nothing like that is involved here. (e) National Black Media Coalition v. FCC, 589 F.2d 578 (D.C.Cir. 1978) involved the FCC's effort to fashion a renewal expectancy policy to govern comparative hearings between an incumbent licensee and a challenger. The appellant wanted the FCC to adopt minimum program percentages in order to qualify for a license renewal expectancy. The FCC -- which had had decades of hands-on experience processing renewal applications containing percentages of various categories of programs, commercial and public service announcements, statistical promises made in one license renewal application compared with statistical performance during an FCC-designated composite week's program logs in an ensuing license renewal application, etc. etc. -- declined to do so, and was upheld by the Court in that policy judgment.

The "structure" of integration. The FCC brief is silent regarding the argument in our opening brief, at 42-47, that the so-called "structure" of the integration factor is a disaster, not a selling point in its favor. The FCC brief, at 24, cites two cases in which, it says, this Court approved the integration structure in preference over a less structured alternative. Both of these cases involved a comparison of a renewal applicant (having a less than exciting record of performance) with a challenging applicant relying on paper promises including integration proposals. (a) Central Florida Enterprises, Inc. v. FCC (I), 598 F.2d 37, 56 (D.C.Cir. 1978), cert. dismissed, 441

U.S. 957 (1979), cited in the FCC brief, rejected an FCC decision which was hopelessly confusing in its discussion of the challenger's integration (characterized as "very weak," having "merit" and then, having "no merit") and which spoke of a fictionalized integration attributed to the incumbent licensee, whose on-site personnel were purely paid employees. On remand, the FCC compared the broadcast record of the incumbent licensee with the paper proposals of the challenger, indicating that the "structure" of integration is a disadvantage in renewal comparative proceedings because applicants can structure their ownership and management on paper whereas the incumbent licensee is dealing with actual operating conditions and performance, Cowles Broadcasting, Inc., 86 FCC2d 993 (1981), an analysis which was noted by this Court in affirming that decision, Central Florida Enterprises, Inc. v. FCC (II), 683 F.2d 503, 509 (D.C.Cir. 1982). (b) Committee for Community Access v. FCC, 737 F.2d 74, 82 (D.C.Cir. 1984) was a straight misapplication of the integration factor by the Commission. The licensee-renewal incumbent was an individual who ran the station, hence, possessing 100% quantitative integration. The Commission downgraded his integration credit because of deficiencies in the operation of the station, matters that might bear on his comparison with the challenging applicant on other grounds, but not as diminishing his 100% integration credit. In reversing the FCC, the Court obviously believed the Commission had manipulated the integration factor to achieved a fore-ordained result in the case.

We have not here asked the FCC to (a) create a fictional integration credit for Mrs. Bechtel for comparison under the integration factor or (b) downgrade the integration credit which has been awarded to Anchor because of some failing which falls outside the scope of the integration factor. We have challenged the legitimacy of the integration factor itself as an invalid predictive tool for measuring the likelihood of service in the public interest. Central Florida and Committee for Community Access involved a twisting of the facts and a distortion of the integration analysis with the apparent purpose of achieving a desired outcome of the proceeding, an inappropriate course of proceeding about which the reviewing panels of the Court felt strongly. Here, there is no such twisting of the facts or sub silentio subversion of the integration factor.

Mrs. Bechtel, we are told, has no chance of winning upon a further remand (FCC brief at 15 n. 4, 28-29). Maybe this is true. Maybe not. We hope to find out. While the FCC regards the two-page written direct testimony offered by Mrs. Bechtel as too sketchy to be persuasive, her testimony provides no less information than Dr. Stamps' one paragraph of testimony on the subject of his integration proposal, received in evidence, on which the FCC has relied for its award of the permit to Anchor. JA 100-02. While this Court has upheld the FCC's decision that Anchor's evidence comes within the boundaries of an acceptable integration proposal, this Court has not accepted the efficacy of that (or any other) integration proposal as being a valid predictive tool -- and for sure not as the only valid predictive

tool -- to measure the likelihood of effectuation of programming service in the public interest. The further remand proceeding should call for a comparison of the proposal of Anchor and the proposal of Mrs. Bechtel, unadorned by any mystique attached to the fact that Anchor's proposal comes within the framework of the integration factor, or any opprobrium attached to the fact that Mrs. Bechtel's proposal does not. Anchor's proposal is for Dr. Stamps to move to the station location and be the full time general manager. Mrs. Bechtel's proposal is to hire a trained professional to manage the station under her supervision, with the assistance of two experienced broadcasters who are her friends and her husband, a life-long communications attorney. Dr. Stamps is a minority.[6] Mrs. Bechtel has ties to the area dating back 40 years by virtue of vacationing and owning a summer home in the area. Dr. Stamps has no such ties. The Commission can evaluate the competent, relevant and material evidence offered by both parties addressed to the trial issue of likelihood of effectuation of program service in the public interest, and determine which party is more likely to provide such service on a meaningful, long-term basis -- not unlike the manner in which hearing officers and judges receive evidence and decide issues in all manner of cases thousands of times daily throughout the nation.

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[6] Dr. Stamps, of course, will receive full credit for his minority status. The FCC's citation, at 15 n. 4, to the statute which precludes it from expending funds to alter its policies regarding minorities is a red herring. Our attack is on the integration factor, and is of equal application whether it be applied to a minority or a Caucasian.

The matter of "retroactivity." Without the benefit of citation to legal authority, the FCC brief, at 10, 30-32, raises the matter of "retroactive" application of the law of this case in two respects, one, regarding the equities of Anchor in reliance on the integration factor and, two, claiming that a ruling in this case adverse to the FCC would apply to every pending comparative case before the Commission, requiring the reopening of all records. It is important to distinguish between the initial case in which the lawfulness of a given policy has been successfully challenged (i.e., the instant case) and other pending cases which involve the policy that has been challenged. The latter involve separate legal issues of "retroactivity" which are not before the Court in this appeal and should be deferred until an appeal in which such legal issues are a justiciable controversy for the Court to resolve.[7]

There is no unfairness to Anchor by a ruling favorable to Mrs. Bechtel here. Anchor and Mrs. Bechtel are parties to a lawsuit in which a legal issue has been litigated, and the decision, whichever way it goes, will be to the advantage of one party and the disadvantage of the other party. See, e.g., SEC v. Chenery Corp., 332 U.S. 194 (1947); NLRB v. Bell Aerospace Co.,

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[7] As this plays out, other cases involving the integration factor may well be broken down into (a) cases where a party raised the same legal issue below, with an offer of alternative proofs as was done by Mrs. Bechtel [as indicated in our opening brief, at 13-16, there are only three of these to our knowledge], (b) cases where a party raised the legal argument below following the Court's decision in the Bechtel case but had not previously raised the legal issue or offered alternative proofs, and (c) cases where a party failed to raise the legal argument below and has raised the argument for the first time before this Court.

416 U.S. 267 (1974); Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987) (upholding retroactive change in comparative factors in FCC hearings for cellular licenses); Clark-Cowlitz Joint Operating Authority v. FERC, 826 F.2d 1074 (D.C.Cir. 1987) (upholding retroactive change in factors in comparative proceedings for licenses to operate hydroelectric power plants).

A leading case in this circuit regarding retroactive application of new law established in adjudications is Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380 (D.C.Cir. 1972), which involved a change in an NLRB policy that had been decided in another adjudication. In that other adjudication (in which this policy change was made), there was no question about application of the changed policy to the parties to that case -- the decision had been made in the circumstances of the case, and the litigants were bound thereby in the normal course. Laidlaw Corporation v. NLRB, 414 F.2d 99 (7th Cir. 1969), cert den., 397 U.S. 920 (1970). Before the Court in Retail was the question of whether the changed policy decided in Laidlaw should be applied to other cases where the parties had acted in reliance on the previous policy. The Court enunciated a five part standard to resolve that question, discussed infra.

More pertinent to the instant case, the Court drew a distinction between application of the changed policy to the parties to the litigation in which the policy was changed (as in Laidlaw and here) and subsequent application of the changed policy to other cases as a byproduct or result of the initial litigation (as in Retail). With regard to the initial litigation

(as in Laidlaw and here) the Court stated:

> The Supreme Court has identified a number of reasons calling for application of a new rule to parties to the adjudicatory proceeding in which it is first announced - reasons which do not apply with the same force to subsequent proceedings. Thus, the Court has suggested that to deny the benefits of a change in the law to the very parties whose efforts were largely responsible for bringing it about might have adverse effects on the incentive of litigants to advance new theories or to challenge outworn doctrines. The Court has also made reference to "sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies."[8]

In the subsequent case of Clark-Cowlitz, supra, the majority of this Court (decided en banc, Circuit Judges Mikva, Robinson and Edwards dissenting), however, applied the five part test under Retail to the litigants in the case which decided the new law. If that were done here, Mrs. Bechtel would still be favored. The first part of the five-part test is whether the case is one of first impression. This favors Mrs. Bechtel, who has pioneered the attack on the integration factor ever since the initial filing of her application seven years ago and has secured a novel decision in Bechtel v. FCC. Parts two and three under Retail favor Anchor, i.e., reliance by parties on old law and length of time of such reliance. However, this must be substantially diminished due to the long-standing and widely-held understanding among the communications bar (of which esteemed counsel for Anchor are well known and thoroughly experienced

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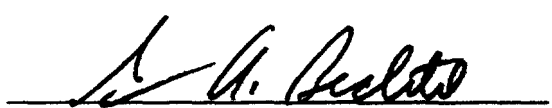
[8] Citing Stovall v. Denno, 388 U.S. 293 (1967), in which the Supreme Court applied the new law to the parties to the case in which the new law was developed, stating that otherwise the purely prospective application of the new law would render the decision mere "dictum" in the case at bar. 338 U.S. at 301.

members) that FCC comparative hearings are highly unpredictable and speculative litigations to engage in, part of the routine advice that is given to any client who is thinking of doing so. Part four strongly favors Mrs. Bechtel as it did in the Maxcell decision, supra, i.e., the limited detriment to Anchor, which does not consist of deprivation of any right or exposure to new liability, but merely results in the altered opportunity to secure a federal privilege. Part five of the Retail test also strongly favors Mrs. Bechtel, i.e., the public interest importance to award licenses to use the public airwaves in a rational and meaningful way.

Respectfully submitted,



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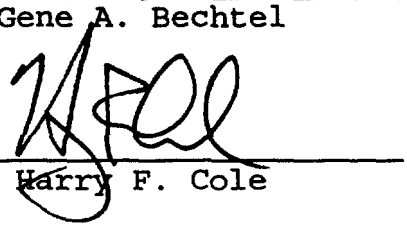

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August 30, 1993

CERTIFICATE OF SERVICE

I certify that courtesy copies of the foregoing COMMENTS OF SUSAN M. BECHTEL (excluding the attached briefs) are being placed in the United States mail, first class, postage prepaid, this 13th day of October 1993 to the following:

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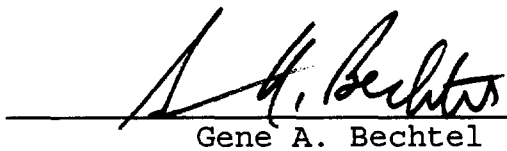

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